WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANK ROMANO, ***Applicant,*** **vs.** **PROVIDENCE HEALTH AND SERVICES; SEDGWICK CLAIMS MANAGEMENT SERVICES,** ***Defendants.***	**Case No. ADJ11065177** **(Marina Del Rey District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact & Award of January 14, 2019, wherein it was found that, while employed as a delivery person on May 6, 2016, applicant sustained industrial injury to his cervical and lumbar spine, causing compensable permanent disability of 4%. In finding permanent disability of 4%, the WCJ adopted the apportionment determination of panel qualified panel evaluator orthopedist Lawrence C. Barnett, M.D. who apportioned "60% of the lumbar spine impairment ... to the injury of 5/6/16" and "40% of the lumbar spine impairment ... to the nonindustrial activities of daily living ...." (June 13, 2017 report at p. 14.)

Applicant contends that the WCJ erred in apportioning permanent disability, arguing that Dr. Barnett's apportionment determination does not constitute substantial medical evidence. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we grant reconsideration, rescind the Findings of Fact & Award of January 14, 2019, and issue a new decision reflecting that applicant is entitled to an unapportioned award of 7 percent permanent disability.

Applicant injured himself while lifting at work. He was evaluated by Dr. Barnett who found no compensable permanent impairment with regard to the cervical spine, but found 5% whole person

impairment with regard to the lumbar spine. Dr. Barnett assigned the lumbar impairment pursuant to Lumbar Spine DRE Category II, which calls for 5-8% whole person impairment in cases which meet the following criteria:

> Clinical history and examination findings are compatible with a specific injury; findings may include significant muscle guarding or spasm observed at the time of the examination, asymmetric loss of range of motion, or nonverifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of the structural integrity and no significant radiculopathy
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> ***or***
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> individual had a clinically significant radiculopathy and has an imaging study that demonstrates a herniated disk at the level and on the side that would be expected based on the previous radiculopathy, but no longer has the radiculopathy following conservative treatment
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> ***or***
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> fractures: (1) less than 25% compression of one vertebral body; (2) posterior element fracture without dislocation (not developmental spondylolysis) that has healed without alteration of motion segment integrity; (3) a spinous or transverse process fracture with displacement without a vertebral body fracture, which does not disrupt the spinal canal.

(American Medical Association Guides for the Evaluation of Permanent Impairment, Fifth Edition, §15.4 DRE: Lumbar Spine, Table 15-3, p. 384.)

At his deposition, Dr. Barnett testified that the "sole basis" for applicant's impairment rating was the presence of muscle spasm. (August 21, 2018 deposition at p. 9.) However, he testified that applicant did not have any history of spasm prior to his industrial injury. (August 21, 2018 deposition at p. 10.) In his June 13, 2017 report, Dr. Barnett had apportioned "40% of the lumbar spine impairment ... to the nonindustrial activities of daily living superimposed on the changes evident in the lumbar spine MRI of 7/25/16." (June 13, 2017 report at p. 14.) However, at his deposition, Dr. Barnett was unable to identify any nonindustrial activities engaged in by applicant which were injurious to the back. (August 21, 2018 deposition at p. 7.) Additionally, although Dr. Barnett testified that applicant's MRI revealed "degenerative disk changes," he admitted that the MRI findings were not the basis for any impairment. (August 21, 2018 deposition at p. 9.)

Labor Code section 4663(c) requires a reporting physician to determine "what approximate

percentage ***of the permanent disability*** was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage ***of the permanent disability*** was caused by other factors both before and subsequent to the industrial injury...." (Emphasis added.) Labor Code section 4660.1(a) states that, "In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement ...." Labor Code section 4660.1(b) makes clear that "'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4." Thus, in determining apportionment, the physician's duty is to determine what percentage of the permanent impairment found was caused by the industrial injury and what percentage of the impairment was caused by factors other than the industrial injury.

Any award of a WCJ or the Appeals Board must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 255 [54 Cal.Comp.Cases 349]; *County of San Luis Obispo v. Workers' Comp. Appeals Bd. (Martinez)* (2005) 133 Cal.App.4th 641, 648 [70 Cal.Comp.Cases 1247].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].) In order to constitute substantial evidence upon which the WCJ may base his decision, a medical opinion may not be based upon surmise, speculation, conjecture or guess. It is not substantial evidence if it is known to be erroneous, based upon facts no longer germane, based upon an incorrect legal theory, or based upon an inadequate medical history and examination. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 1993]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 801 [33 Cal.Comp.Cases 358].) "[I]n the context of

apportionment determinations, the [expert] opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician [or vocational expert] is properly apportioning under correct legal principles." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 [Appeals Bd. en banc].)

Here, Dr. Barnett did not describe how nonindustrial factors contributed to applicant's permanent impairment. Dr. Barnett testified that he placed applicant in Lumbar DRE Category II, and assigned 5% WPI, because of the presence of muscle spasm, but he did not discuss in his report or deposition testimony how nonindustrial factors contributed to the presence of muscle spasm. Rather, Dr. Barnett referred to an MRI which showed degenerative changes, but which the doctor admitted was not the basis behind his impairment determination. While applicant may have nonindustrial pathology and while applicant's general back "condition" may be 40% attributable to nonindustrial causes, the relevant inquiry is causation of the impairment found by the reporting physician, not an amorphous "condition."

Dr. Barnett did not discuss how factors other than the industrial injury caused applicant's permanent impairment. "The burden of proving apportionment falls on the [defendant]...." (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) Since defendant did not meet its burden, we will grant reconsideration, rescind the WCJ's decision, and issue a new decision reflecting applicant's entitlement to an unapportioned award.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings of Fact & Award of January 14, 2019 is **GRANTED**.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact & Award of January 14, 2019 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

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FINDINGS OF FACT

1. Frank Romano, born , while employed on May 6, 2016, as a supply chain delivery person, Occupational Group 360, in Torrance, California, by Providence Health & Services, sustained injury arising out of and in the course of employment to his cervical and lumbar spine.

2. At the time of injury, the employer was permissibly self-insured.

3. At the time of injury, applicant's earnings were $713.19 per week, entitling applicant to permanent disability indemnity at the rate of $290 per week.

4. Applicant's injury caused permanent disability of 7%, equivalent to 21 weeks of indemnity commencing on June 13, 2017, payable at the rate of $290 per week.

5. Apportionment of permanent disability is not indicated.

6. Applicant is entitled to further medical treatment to cure or relieve from the effects of the industrial injury herein.

7. The County of Los Angeles County Child Support Services is allowed and is to be paid out of applicant's Award in a manner to be adjusted by the parties with WCAB jurisdiction reserved in the event of a dispute.

8. The reasonable value of services rendered by applicant's attorney is $913.50.

9. The issue of discrimination pursuant to Labor Code section 132a is deferred with jurisdiction deferred.

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AWARD

AWARD IS MADE in favor of **FRANK ROMANO** against **PROVIDENCE HEALTH & SERVICES** as follows:

(a) Permanent disability indemnity in the accrued amount of $6,090, less an attorney's fee of $913.50 payable to Edward Singer, and less the lien of Los Angeles County Child Support Services, whose lien is hereby allowed.

(b) All further medical treatment reasonably required to cure or relieve applicant from the effects of the industrial injury herein.

(c) Interest from the finding and making of this Award.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

MARGUERITE SWEENEY

JUAN PEDRO GAFFNEY R

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 09 2019

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

EDWARD SINGER
FAMILGLIETTI & VOLPE
FRANK ROMANO
LOS ANGELES COUNTY CHILD SUPPORT SERVICES DEPARTMENT

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